SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19106

JOSEPH FORTIN ET AL.

v.

HARTFORD UNDERWRITERS INSURANCE COMPANY ET AL.

BRIEF OF THE DEFENDANT–APPELLEE NORTH RIVER INSURANCE COMPANY WITH SEPARATE APPENDIX

FOR THE DEFENDANT-APPELLEE NORTH RIVER INSURANCE COMPANY:

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TO BE ARGUED BY:

FRANK H. SANTORO OR
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COUNTER STATEMENT OF THE ISSUE

DID THE APPELLATE COURT PROPERLY AFFIRM THE TRIAL COURT'S DECISION GRANTING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT NORTH RIVER INSURANCE COMPANY.[1]

[1] This is a verbatim statement of the issue as articulated in this Court's grant of certification at 308 Conn. 905 (2013). This issue subsumes several alternate bases to affirm which are discussed in the text of this brief.

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I. COUNTER STATEMENT OF THE FACTS AND THE NATURE OF PROCEEDINGS

Joseph Fortin, Samuel Kofkoff, Robert Kofkoff, and Kofkoff Egg Farm, LLC (hereinafter "plaintiffs"), appeal from a decision of the Appellate Court affirming the summary judgment in favor of North River Insurance Company ("North River"). The Appellate Court found that the trial court properly excluded the testimony of plaintiffs' expert witness. Both courts below found that the expert's testimony was without substantial value to a finder of fact because, in numerous critical and fundamental respects, it lacked any adequate factual basis. The Appellate Court then affirmed summary judgment for North River because: (1) without the excluded expert testimony, plaintiffs could not demonstrate the reasonableness of the complex settlement for which they sought coverage, and (2) establishing the reasonableness of the settlement was a necessary prerequisite to coverage.

The parties' dispute concerns the obligations of North River, an excess insurer, for the defense and indemnification of plaintiffs in litigation into which they were joined by Julius and Dora Rytman. The underlying litigation has a very complicated history.[2]

The story began decades ago with Julius and Dora Rytman, who had operated several successful chicken and dairy farming enterprises in Eastern

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[2] The major documents in this case are reprinted in the Appendix. Although the pages are numbered consecutively, the Appendix is divided into two volumes. Volume I deals primarily with the exclusion of the Faulkner testimony and Volume II deals primarily with other issues. This is the same appendix that was used in the Appellate Court. Deposition testimony is cited pursuant to General Statutes § 52-158. Since this appeal was filed before July 1, 2013, the old rules relating to the Appendix are utilized.

Connecticut for many years. The Rytmans developed close business and personal relationships with members of the Kofkoff family and Joseph Fortin (the "Kofkoff Group"), who were involved in similar business activities. They also developed a close relationship with Milton Jacobson, their long-time attorney. In the early 1980s, the Rytmans became financially overextended. The Rytman financial problems created tension with the Kofkoff Group and attorney Jacobson, both of whom were blamed by the Rytmans for profiting at their expense (See A 142-281).

The Rytman-Kofkoff tension boiled over into litigation in 1988. The Rytmans joined the Kofkoff Group and Jacobson as third-party defendants in a mortgage foreclosure action brought against the Rytmans by Connecticut National Bank ("CNB") (the "CNB litigation").[3] At least six other lawsuits also broke out between the parties.[4] The Rytman-Kofkoff litigation was extraordinarily

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[3] While the CNB foreclosure action, including its counterclaim and cross complaint, was still pending, the Rytmans instituted a separate action against CNB and Kofkoff Group under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). That action was removed to federal court where the district court granted summary judgment to the defendants, Rytman v. Kofkoff Egg Farm Ltd. Partnership, No. 2:91CV01146 (PCD) (D. Conn. September 3, 1992). This ruling was affirmed by the United States Court of Appeals for the Second Circuit, Rytman v. Kofkoff Egg Farm, 999 F.2d 537 (2d Cir.1993), and the Rytmans' petition for certiorari to the United States Supreme Court was denied.

[4] In addition to the CNB litigation, Connecticut National Bank v. Julius Rytman et al, No. X01 CV 87 0159941, these included: Dora Rytman v. Colchester Foods, CV X 01 88 0159961; Julius Rytman v. Colchester Foods, CV X 01 90 0159898-S; Julius Rytman v. Milton Jacobson, CV X01 90 0159900-S; Town of Franklin v. Dora Rytman et al, CV X01 90-0160302-S; Town of Franklin v. Dora Rytman et al, CV X01 90-0160305-S; and Town of Franklin v. Dora Rytman et al, CV X01 90-0160306-S.

lengthy and complex. It spawned much judicial activity, including a decision in which the Court noted "the burdens of this protracted litigation on the judicial branch." Connecticut National Bank v. Rytman, 241 Conn. 24, 37 (1997). The litigation lasted for 14 years before it ended in a global settlement of all claims and suits between the parties (including but not limited to the seven pending civil actions between the parties), as a result of a mediation in September 2002 (the "global settlement").

When they were joined into the CNB suit, the plaintiffs sought a defense from their primary general liability insurers, The Home Insurance Company ("The Home") and The Hartford Underwriters Insurance Company ("The Hartford"). They also sought insurance coverage from North River, which provided excess liability coverage over The Home and The Hartford policies for part of the relevant time period.[5]

The Rytmans' claims against the plaintiffs in the CNB case focused on commercial harm and economic loss—claims not covered under general liability policies. (A. 992-1011). The plaintiffs contended there was insurance coverage for the CNB suit by virtue of an incident in October 1984 in which Samuel Kofkoff

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[5] Relevant excerpted pages from the policies are at A 824-842. The Home and The Hartford policies are general liability policies, providing coverage subject to their terms and conditions for bodily injury or property damage, as well as personal injury coverage. The North River policy is an excess policy, providing similar coverages. The coverage chart used in the trial court (Exhibit 12 to the Fortin deposition) is reprinted in the Appendix at A 843-846. A simpler coverage chart prepared by North River for mediation in the inter-insurer litigation (Home Insurance Company in Rehabilitation v. Hartford Underwriters Insurance) is reprinted at A 847.

allegedly made false and malicious statements about the Rytmans to the CNB Advisory Board (the "CNB incident") and the alleged negligent infliction of emotional distress as a by-product of the financial injury to the Rytmans.[6]

The two primary insurers entered into an arrangement by which the Kofkoff Group was provided a full defense to the CNB suit.[7] The Hartford participated with The Home in plaintiffs' defense until approximately January 2002, when an amendment to the underlying complaint led The Hartford to believe that there was no longer any covered claim (A 3). The Home assumed 100% of the defense costs from January 2002 to the global settlement in September 2002 (A 885).[8] Because North River's policy provides that there is a duty to defend only for an occurrence not covered by any underlying insurance collectible by the insured (A 840), and because a complete defense to the CNB

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[6] See Second Revised Amended Third-Party Complaint, dated April 24, 2002 (A 972-1011), the pleading used as the basis of the trial court's coverage determinations in this case (See A 600). The complaint went through several revisions, and an earlier version contained an explicit claim that the CNB incident was defamatory. It was the deletion of this explicit defamation claim that caused The Hartford to withdraw from the defense in 2002.

[7] As part of an agreement that allowed the Kofkoff group to choose its defense counsel, Robinson & Cole, the Kofkoff Group agreed with the insurers upon a formula whereby the insurers would pay two-thirds of the defense costs, and the Kofkoff Group would pay the remaining one-third (See A 878-880; 884-885; 853-855).

[8] Inter-insurer litigation ensued between the primary insurers as a result of The Hartford's withdrawal from participation in the defense. See Home Insurance Company in Rehabilitation v. Hartford Underwriters Insurance (A 1012-1049).

suit was being provided at all times by a primary insurer,[9] North River did not participate in the defense.

In 2003, after the global settlement (A 649-671), plaintiffs brought this case against The Hartford and North River.[10] Plaintiffs' theory of the case has been that The Hartford and North River each breached a duty to defend, and, under Missionaries of the Co. of Mary, Inc. v. Aetna Casualty & Surety Co.,155 Conn. 104 (1987) and its progeny, plaintiffs allege that they are entitled to recover the full unreimbursed amount of the global settlement (up to each insurer's policy limit) by virtue of the insurers' allegedly wrongful failure to defend (A 785-790; 1066-1073; 530; 960). Pursuant to this litigation strategy, plaintiffs have refrained from directly seeking a determination of any insurer's duty to indemnify the global settlement (See A 517, 761, 936, 967, 1069),[11] but concentrated instead on seeking rulings that the insurers improperly failed to defend.

In an April 6, 2005 opinion (A 589-609), articulated on September 29, 2010 (A 642-647), the trial court held that The Hartford had a duty to defend the CNB suit and that, despite its status as an excess insurer, North River had a duty

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[9] In his deposition, Robert Kofkoff testified that, after The Hartford withdrew from the defense, The Home paid the insurers' full agreed share of costs, and the plaintiffs "did not have to pay one cent more in defense costs after the Hartford withdrew." (A 885).

[10] Because The Home had always provided a defense and had contributed a negotiated amount to the global settlement, it was not sued.

[11] Plaintiffs specifically rejected a claim that any indemnification of the settlement owed should be reduced by amounts allocable to claims not possibly covered by the policy (A 789).

to defend during the periods of time when The Hartford did not participate in the defense.[12] The question of North River's duty to defend is presented in this appeal as an alternate basis of affirmance or adverse ruling under Appellate Rule 84-11(c).

After the trial court ruled that the insurers had breached a duty to defend the CNB suit, plaintiffs sought as a consequence of that finding to impose on the insurers the liability for their settlement (up to the limits of the policies), under Missionaries of the Co. of Mary, Inc. v. Aetna Casualty & Surety Co., 155 Conn. 104 (1987). Plaintiffs thus sought to establish the objective reasonableness of their settlement, a necessary step to imposing that liability on the insurers. Metropolitan Life Insurance Company v. Aetna Casualty & Surety Company, 249 Conn. 36, 55 (1999). To discharge this burden, they disclosed attorney Dale Faulkner as an expert witness (A 50-51). When Mr. Faulkner was deposed about the basis for his opinion (A 308-475), Mr. Faulkner opined that the $3.15 million was a reasonable amount for plaintiffs' settlement of the CNB suit. (A 50-51; 308-475). He admittedly had not seen the Mutual Release Agreement reflecting the terms of the parties' global settlement for $3.15 million (A 436-437), and did not know how much of the settlement amount was paid for the CNB suit versus the parties other litigation (A 437-438) or the value of individual counts in the CNB suit (A 435-436). Based on the record demonstrating fundamental

[12] North River's motions to reargue (A 610-612) and to certify an interlocutory appeal (A 613-615) were denied. The relevant opinions of the trial court are reported at 2005 WL 1083800 (Conn. Super. 2005); 2006 WL 3524570 (Conn. Super. 2006); and 2007 WL 345622 (Conn. Super. 2007). The appellate court did not reach the issue of whether North River had any duty to defend the

uncertainties in the essential facts on which his opinion was predicated, and the failure to apply a reasonable methodology to form his opinion, North River thereafter moved to preclude the Faulkner testimony.

On February 19, 2009, with expert depositions completed and trial approaching (A 8), the trial court granted North River's motion to preclude the Faulkner testimony, finding that Mr. Faulkner's own deposition testimony established that he did not consider sufficient facts to opine as to whether the settlement of the CNB action was objectively reasonable (A 14). The trial court did not find that a missing fact would make the opinion more or less persuasive, but that the missing facts were such as essential part of the factual foundation of the opinion that their absence robed it of any persuasive force. (A 7). Concluding that the testimony was not grounded on sufficient facts, the court found that Faulkner's testimony could not assist the trier of fact. (A 15). Turning to North River's motion for summary judgment, and finding that a lay jury did not have the knowledge, training or experience to evaluate the reasonableness of the CNB settlement in view of the complexity of the underlying litigation (A 15-22), the trial court then granted summary judgment to North River.[13]

CNB case.

[13] On May 6, 2009, the trial court denied various post-decisional motions of the plaintiffs and entered a final judgment in favor of North River (A 23-48). The February 19, 2009 and May 6, 2009 opinions of Judge Shapiro are reported at 2009 WL 659260 and 2009 WL 1532272. In another opinion, also dated February 19, 2009, the trial court dismissed the bad faith and extra-contractual liability claims against The Hartford (A 616-639). 2009 WL 659210.

The plaintiffs appealed from the orders excluding Mr. Faulkner's testimony and granting summary judgment to North River.[14] North River filed a cross-appeal and/or Rule 63-4 statement with respect to the 2005 ruling that North River breached a duty to defend.[15] The Appellate Court affirmed the trial court's rulings excluding the plaintiff's expert and granting summary judgment to North River in an opinion reported at 139 Conn. App. 826 (2013). This Court granted certification at 308 Conn. 905 (2013), and this appeal followed.

Additional facts will be recounted as necessary in the argument section to which they relate.

II. ARGUMENT

A. AS THE APPELLATE COURT AND THE TRIAL COURT FOUND, THE TESTIMONY OF PLAINTIFFS' EXPERT WAS PROPERLY PRECLUDED GIVEN THE LACK OF ADEQUATE FOUNDATION

1. STANDARD OF REVIEW

The general standard of review of a trial court's evidentiary decision is abuse of discretion. See, e.g., Centrix Mgmt. Co., LLC v. Valencia, 132 Conn. App. 582, 592-93 (2011) (quoting State v. Wright, 58 Conn. App. 136, 148 (2000)). Because summary judgment was granted based on the exclusion of Mr. Faulkner's testimony, the Appellate Court applied a plenary standard of review to the decision to preclude expert testimony, citing DiPietro v. Farmington Sports

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[14] Shortly before this appeal was filed, the plaintiffs and The Hartford settled for $500,000. (A 128-133).

[15] After having initially denied a motion for articulation (A 640; see also 791-800), on September 29, 2010, Judge Quinn articulated her 2005 ruling (A 642) in response to the grant of a motion for review (A 641; See also 811-822).

Arena, LLC, 123 Conn. App. 583, 610-612 (2010).[16] North River respectfully submits that Mr. Faulkner's testimony properly was precluded under a plenary standard *or* an abuse of discretion standard.

Under the Appellate Court's approach, plenary review would apply to virtually any pre-trial decision to exclude expert testimony, at least where a case is resolved without trial. That approach is in tension with longstanding law concerning the trial court's discretion in ruling on the admissibility of expert testimony. See, e.g., State v. Pappas, 256 Conn. 854, 878 (2001), General Electric Co. v. Joiner, 522 U.S. 136, 141-143 (1997). It is also in tension with cases such as Milton v. Robinson, 131 Conn. App. 760, 770 (2011), and Dorreman v. Johnson, 141 Conn. App. 91, 96 (2013), which each affirmed the exclusion of expert testimony under an abuse of discretion standard and also affirmed the grant of summary judgment. See also Sherman v. Bristol Hospital, Inc., 79 Conn. App. 78 (2003).

2. THE PRECLUSION OF THE FAULKNER TESTIMONY

It is well accepted that a trial court may exclude expert testimony for lack of an adequate foundation.[17] Under any standard of review, the trial court correctly excluded Mr. Faulkner's testimony -- and the Appellate Court correctly affirmed that decision. Because his testimony lacked an adequate foundation,

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[16] This Court's ruling in DiPietro v. Farmington Sports Arena, LLC, 306 Conn. 107, 111 n.2, 49 A.3d 951 (2012), did not reach the standard of review issue.

[17] See Connecticut Code of Evidence, §§ 7-2 and 7-4; Viera v. Cohen, 283 Conn. 412, 449 (2007); State v. Carpenter, 275 Conn. 785, 805-813 (2005); State v. Douglas, 203 Conn. 445, 452 (1987); Going v. Pagani, 172 Conn. 29, 35 (1976); Liskiewicz v. LeBlanc, 5 Conn. App. 136, 139-141 (1985).

the basis for Mr. Faulkner's opinion was unsound and his testimony had no value. (A 3-14.) Indeed, Mr. Faulkner's testimony was not based on sufficient facts or reliable methodology, and its admission would be unfairly prejudicial.

As the courts below found, there plainly was a lack of foundation for the expert testimony because, *inter alia*:

> Mr. Faulkner formed his opinions primarily based on his review of the mediation statements without reviewing underlying facts (A 14-15) and did "nothing" to go behind the claims and allegations in the parties' position papers (A 365);
>
> despite agreeing that allegations are proof of almost nothing, he did not go beyond the allegations and did not evaluate the evidence that may have existed or strength of the damage claim as it related to each count in the CNB complaint (A 435);
>
> he did not know Robert Kofkoff and Joseph Fortin stated that they believed they would prevail (A. 405) and that Joseph Fortin characterized the Rytman litigation as a "joke" (A 32).
>
> he was unfamiliar with whether the parties in the underlying litigation had retained experts or what their opinions might have been (A 32-33, 97-98);
>
> he had not researched the law of slander and did not know whether it is axiomatic that truth is an absolute defense to the tort of slander (A 418);
>
> he did not know whether the statements made by Samuel Kofkoff to the CNB Board were true or not but agreed that, if they were true and were the entirety of what was said, there would be no basis for the Rytmans' claims (A 421-422);
>
> he did not know whether Count 1 of the CNB complaint had substantial value versus Count 3 having no value, and that would hold true throughout the counts (A 436);
>
> he did not know how much of the $3.15 million global settlement amount was paid for the settlement of other cases versus the CNB case, or what a reasonable settlement amount would be for the other cases that were resolved and incorporated into the global settlement (A 437-438); and

> he had not seen the Mutual Release Agreement dated September 11, 2002, which memorialized the terms of the parties' $3.15 million global settlement. (A 436-437).

(See A 2-48; 139 Conn. App. 826).[18]

Questions about the absence of any proper factual foundation for Mr. Faulkner's testimony do not go to weight rather than admissibility, as plaintiffs contend. The trial court properly found that his own testimony established that Mr. Faulkner "did not consider sufficient facts to opine on whether settlement of the CNB action was objectively reasonable." (A 14). While plaintiffs contend that certain facts were not "essential" to Mr. Faulkner's testimony (Plaintiffs Brief, pages 10-30), the missing facts here were so fundamental that they established that Mr. Faulkner's testimony was not grounded on a sufficient facts to assist the trier of fact in determining any issue. (A 15). Without consideration of the key facts of the parties' global settlement, Mr. Faulkner's testimony about the alleged reasonableness of the settlement of the CNB case, a part of that global resolution of the parties' litigation, had no value. The decisions of the courts below excluding his testimony should be affirmed.

The judgment as to whether expert testimony is sufficient for foundational purposes is a highly factual determination as to which the party offering the

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[18] These are only a few examples of the insufficiency of the factual basis for the Faulkner testimony. The Memorandum in Support of North River's Motion to Preclude (dated October 6, 2008) includes many others. For example, Mr. Faulkner had not considered the consequences of a pre-existing 1987 General Release (A 369; 407-409); had not considered a 2000 Purchase Agreement in which the plaintiffs had represented that there was "zero liability" exposure to the Rytman litigation (A 398-403); and did not know that Julius Rytman had been convicted of a felony (See A 422-424; 292).

testimony has the burden of proof. Argumentative differences are not a substitute for the judgmental process. If the "gestalt" process of reasoning of the trial court is sound, it is not persuasive to argue over divergent factual particulars. As the Appellate Court found, the trial court's ruling here was an appropriate exercise of the judicial power to exclude expert testimony for lack of foundation, and should not be disturbed.

As such, the DiPietro case is also of limited utility. That case involved testimony of a professor of biomechanics on the floor surface of a soccer facility, which was intertwined with whether premises liability theory (in which expert testimony was not necessarily required) should apply. That setting is vastly different from the testimony of a legal expert offered to tease out the amount for a reasonable settlement of one claim within the global settlement of complex, multi-claim, multi-suit litigation where that conclusion will determine rights to insurance coverage. Here, an expert was required to provide an opinion on the value that the adversarial legal system would place on disputed facts about complex business matters—an inexact science at best. Expert testimony with a proper foundation and which explains in detail why a certain settlement value is warranted is especially important for fairness purposes in the context of insurance settlements because the Missionaries rule makes the insurer automatically liable for a settlement determined to be "reasonable." Allowing an expert to testify when adequate foundation has not been shown in this setting would be unfairly prejudicial.

In light of the complexity of the subject matter and these fairness considerations, a significant body of law rejects expert testimony about settlements or the reasonableness thereof where it is based on little more than *ipse dixit* or speculation.[19] For example, in Pasha v. Rosemount Memorial Park, Inc., 781 A.2d 1119, 1122-1125 (N.J. Super. Ct. App. 2001), a court applying New Jersey law (which is similar to Connecticut law on this issue) found unpersuasive expert testimony that merely asserted without factual support that a settlement was reasonable. The court explained that this "analytical framework" of placing on the insured the burden of demonstrating through competent evidence that a settlement is reasonable "serves to protect the carrier from having to pay a settlement reached through collusion between the insured and the injured third party or which is otherwise unreasonable and the product of bad faith." Id.[20]

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[19] See, e.g., Exotics Hawaii-Kona, Inc. v. DuPont de Nemours & Co., 172 P.3d 1021, 1049-1050 (Haw. 2007); Burrow v. Arce, 997 S.W.2d 229, 234-237 (Tex. 1999); Griswold v. Kilpatrick, 27 P. 3d 246, 248-249 (Wash. App. Div. 2001); Kaplan v. Skoloff & Wolfe, P.C., 770 A.2d 1258, 1262-1263 (N.J. Super. Ct. App. Div. 2001); Merritt v. Goldenberg, 841 N.E.2d 1003, 1011-1012 (5th Dist. 2005); Mainor v. Nault, 101 P.3d 308, 323-325 (Nev. 2008); Minkina v. Frankl, No. CV09-01961C, 2012 WL 3104905, at *4 (Mass. Super. Ct. June 19, 2012); Elizondo v. Krist, 338 S.W.3d 17, 21-22 (Tex. App. 2010).

[20] The trial court and the Appellate Court also correctly rejected the plaintiffs' post-judgment motions, including the argument that the need for expert testimony could be satisfied by plaintiff Robert Kofkoff (See A 40-47; 139 Conn. App. 842, n. 8.). Mr. Kofkoff's presumptive testimony that the settlement was reasonable is hardly surprising, since he was the very person who agreed to it (A 573 ("Robert Kofkoff is the one that decided to settle the case.")). Mr. Kofkoff's motivation to settle may have been influenced not solely by the merits of the Rytman claim but also by the prospect of recovering his settlement expenditures through this insurance coverage action.

Not only did the Faulkner testimony lack adequate foundation, the Faulkner testimony also would have been subject to exclusion under State v. Porter, 241 Conn. 57 (1997), because the principles and methodologies underlying his testimony could not meet the requisite standard of validity. Mr. Faulkner acknowledged that statements made in pleadings and mediation statements are proof of "almost nothing" and that it is necessary to get behind those claims to see what if any evidence supports them (A 363, 435). Yet when confronted with whether or not he followed this methodology, he testified that he "did nothing" (A 363). Mr. Faulkner offered subjective conclusions, not tied to verifiable facts, and not based on accepted technique in evaluating the value of legal claims.

Furthermore, Mr. Faulkner did not, and had no basis on which to, address the reasonableness of the amount to settle the CNB case, apart from the resolution of at least six other litigations between the parties. (A 437-438).[21] He also testified that he could not say whether Count One of the CNB complaint had substantial value versus another count having no value, and that this would hold rue throughout the nineteen counts of the complaint. (A 436). This is important because the trial court found only that the allegations of Court Twelve were sufficient to trigger the duty to defend (A 600-607), and the plaintiffs had alleged

[21] The trial and appellate courts found the Faulkner testimony deficient because it did not allocate the settlement among the seven cases between the Rytmans and the Kofkoff Group. Consistent with this Court's ruling in Capstone, it also is deficient because it did not allocate between covered and non-covered claims in one of those cases: Connecticut National Bank v. Julius Rytman et al, No. X01 CV 87 0159941.

only that three counts (counts twelve, seven and fourteen) of the nineteen-count CNB complaint triggered a duty to defend (A 598). See Capstone Building Corp. v. American Motorists Ins. Co., 308 Conn. 760 (2013).[22] Under Capstone, the expert testimony is plainly insufficient to demonstrate the reasonableness of the settlement amount associated with potentially covered claims, given the fact that the majority of the Rytman claims, and the majority of counts in the CNB suit, were not even possibly covered (See A 5; 50-51; 308-475).[23]

Finally, the trial court was also well within its discretion to perform a definitive evaluation of the Faulkner testimony when it did, despite the possibility of supplementation. See Connecticut Code of Evidence, § 7-4; Shukis v. Bd. of Educ., No. CV040104038S, 2007 WL 1470241 at *3 (Conn. Super. Ct. May 2, 2007) (refusing to allow plaintiff to supplement expert disclosures where purpose

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[22] Capstone should be applied here. Judicial decisions which are not limited by their terms to prospective application are normally applied retroactively to pending cases. Marone v. Waterbury, 244 Conn. 1, 10-11 (1998).

Indeed, Capstone's conclusion that holding an insurer liable for the settlement of claims which it had no duty to defend is per se unreasonable, and its limitation of the Missionaries rule, are particularly applicable here, where the plaintiffs conspicuously refrained from seeking indemnity (See A 517, 761, 936, 967, 1069) and concentrated their efforts on the duty to defend (A 761, 967, 1069) in hopes of unreasonably benefiting from an extraordinarily broad reading of the Missionaries rule. In this case, rationales underlying both judicial and equitable estoppel support precluding the plaintiffs from changing their litigation strategy and theory of liability at this late date. See Fischer v. Zollino, 303 Conn. 661, 668-669 (2012); Association Resources, Inc. v. Wall, 298 Conn. 145 (2010); see also Dougan v. Dougan, 301 Conn. 361 (2011).

[23] Even absent Capstone, and regardless of whether an indemnity obligation arises from the defense or the indemnity provisions of the policy, allocation is appropriate pursuant to Security Insurance Company v. Lumberman's Mutual Casualty Co., 264 Conn. 688 (2003) (defense and indemnity costs potentially allocable in multiple trigger case).

was to strengthen opinions after weaknesses were exposed during depositions); see also Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 571 (5th Cir. 1996). The trial court's citation to McVerry v. Charash, 96 Conn. App. 589, *cert den* 280 Conn. 934 (2006), on the importance of docket control was right on point (A 45-46). The court has the right to enforce its discovery and scheduling rules.[24] "Caseflow management is based upon the premise that it is the responsibility of the court to establish standards for the processing of cases and also, when necessary, to enforce compliance with such standards. Our judicial system cannot be controlled by the litigants and cases cannot be allowed to drift aimlessly through the system." McVerry, 96 Conn. App. at 600 (quoting In re Mongillo, 190 Conn. 686, 691 (1983)). The coverage litigation had been pending for almost two years, and expert depositions were complete at the time of the first trial court ruling on the motion to preclude, and the trial here was scheduled for slightly over a month from the date of the last of the trial court's two determinations regarding Mr. Faulkner's testimony (See A 23). Thus, the trial court appropriately exercised its discretion to exclude the Faulkner testimony.

B. BOTH COURTS BELOW CORRECTLY CONCLUDED THAT NORTH RIVER WAS ENTITLED TO SUMMARY JUDGMENT DUE TO THE ABSENCE OF NECESSARY PROOF OF THE REASONABLENESS OF THE SETTLEMENT

1. STANDARD OF REVIEW

[24] Cf. Wyszomierski v. Siracusa, 290 Conn. 225, 235 (2009) ("The purpose of Practice Book § 13–4(4) [requiring timely disclosure of experts] is to assist the parties in the preparation of their cases, and to eliminate unfair surprise by furnishing the opposing parties with the essential elements of a party's claim.").

Review of the grant of summary judgment is governed by a plenary standard. The summary judgment in this case was based on the trial court's conclusion that the issue of the reasonableness of the settlement was a matter requiring expert testimony (A 15-22). The question of whether expert testimony is required is a legal one governed by a plenary standard of review, Neff v. Johnson Memorial Hospital, 93 Conn. App. 534, 539 (2006).

2. SUMMARY JUDGMENT FOR NORTH RIVER

Expert testimony traditionally is regarded as required in proving the reasonableness of a settlement for insurance coverage purposes.[25] A federal district court applying Connecticut law held that expert testimony was required to demonstrate a policyholder's damages in an insurance case because "prudent claims adjustment and processing, trial strategy, and judicial case management are not within the knowledge of the average juror." Windmill Distrib. Co., L.P. v. Hartford Fire Ins. Co., 742 F. Supp. 2d 247, 262 (D. Conn. 2010) (citing LePage v. Horne, 262 Conn. 116, 125 (2002); Montagnon v. Pfizer, 584 F. Supp. 2d 459, 463-64 (D. Conn. 2008)).

Expert testimony is often required to prove the reasonableness of settlements in a variety of contexts because the "many factors that go into a settlement are not within the knowledge of the average juror." Kelly v. Berlin, 692

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[25] See, e.g., Pasha v. Rosemont Memorial Park, 781 A.2d 1119 (N.J. Super Ct. App. Div. 2001); Kaplan v. Skoloff & Wolfe, P.C., 770 A.2d 1258 (N.J. Super. Ct. App. 2001); Chomat v. N. Ins. Co. of N.Y., 919 So.2d 535, 538 (Fla. Dist. Ct. App. 2006); Midwestern Indem. Co. v. Laikin, 119 F. Supp. 2d 831, 844-45 (S.D. Ind. 2000); Associated Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65, 87 (Kan. 1997); Alton M. Johnson Co. v. M.A.I. Co., 463 N.W.2d 277, 279 (Minn. 1990).

A.2d 552, 558-59 (N.J. Super. 1997).[26] In that regard, what is at issue in evaluating the reasonableness of a settlement—in the insurance coverage context or otherwise—is "the reasonableness of a business decision ... to settle particular litigation for a given amount. Such a decision properly requires the consideration of available factual information, an understanding of the applicable law, and knowledge of jury verdicts in the forum in which the action is to be tried. These are the tools which the litigator must employ in evaluating any given case. ... Litigation is a complex business requiring the attention of specialists." Jiffy Foods Corp. v. Hartford Acc. & Indem., 331 F. Supp. 159, 160 (W.D. Pa. 1971).

As the courts below held, in this case, a lay jury does not have the knowledge, training or experience to evaluate the reasonableness of the settlement in view of the complexity of the multiple claims and suits litigated over 14 years between the feuding parties. That evaluation would include an understanding of the damages sustained and the size of the possible recovery in a series of complex inter-related business claims, as well as the likelihood that

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[26] As the trial court noted, parallels can also be drawn to the need for expert testimony in legal malpractice and fee collection cases. See, e.g., Grimm v. Fox, 303 Conn. 322, 329-30 (2012) (expert testimony usually required in legal malpractice cases because knowledge and skills of attorney are different and beyond those of average juror); St. Onge, Stewart, Johnson & Reens, LLC v. Media Grp., Inc., 84 Conn. App. 88, 96 (2004) (expert testimony required in fee collection case where fact finder must assess legal strategy and outcomes); Celentano v. Grudberg, 76 Conn. App. 119, 126 (2003) (attorney's standard of care, which depends on particular circumstances of attorney's representation, is beyond experience of average layperson). See, e.g., Associated Wholesale Grocers, 934 P.2d at 87 ("In a case of this size and complexity, independent expert testimony evaluating the strengths and weaknesses of the parties' positions could be presented."). Cf. Alton M. Johnson, 463 N.W.2d at 279 (Minnesota courts hold that determination of whether settlement is reasonable should be made by trial judge rather than jury because complexity and nature of

liability would be established and degree of probability of success under applicable law for each of the many claims made. Despite this, the Plaintiffs argue that expert testimony was not necessary here because the issues were not manifestly beyond the ken of an average trier of fact (Plaintiffs' Brief, pages 31-35). This argument flies in the face of the record and misapprehends the nature of the global settlement at issue. Expert testimony is especially needed when the facts of the underlying controversy are complex. In this case, the trial court's finding that expert testimony was required was expressly premised on the complexity of the case (A 18-21).[27] The Appellate Court agreed with this conclusion. This Court also remarked on the complexity of the underlying litigation in considering the severance of the CNB foreclosure action from the cross complaint in Connecticut National Bank v. Rytman, 241 Conn. 24, 51 (1997).[28]

Moreover, the global settlement in this case was not broken down into a series of isolated transactions, each of which was settled separately. It was precisely the purpose of the 2002 global mediation to bring every element of the parties' long-running controversy together, to be dealt with in a final and

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the evidence does not lend itself well to appraisal by a jury).

[27] The file in the underlying case involved approximately 130 boxes of documents (A 550).

[28] As the Court said there, considering only the CNB suit itself: "The contentious nature of this action and the prolixity of the pleadings has, in many ways, obscured these facts. As the trial court aptly noted, "[t]he course of this litigation has been long and torturous, with the more than 950 separate pleadings filed to date occupying forty-seven file folders and some nine linear feet of shelf space. Virtually no issue or claim has gone uncontested."

comprehensive manner. As any mediator might attest, the resolution of multiple litigations in a combined mediation is complex and challenging. Thus, with respect to the multi-suit, multi-claim settlement at issue here, the evaluation of the reasonableness of the cost of each suit,[29] and then each of the claims within each of those suits (e.g., the nineteen claims within the CNB suit) (A 972-1011), is a quintessential example of a setting where expert testimony is required.

Contrary to plaintiffs' assertion, summary judgment for North River was appropriately granted given the absence of expert testimony concerning whether the settlement was objectively reasonable. And, there was no error in granting summary judgment immediately after ruling on the admissibility of the Faulkner testimony. Courts frequently rule on the admissibility of expert testimony in the context of dispositive motions. See, e.g., Dimmock v. Lawrence & Mem'l Hosp., Inc., 286 Conn. 789, 814-15 (2008); Dorreman v. Johnson, 141 Conn. App. 91, 98-99 (2013); Milton v. Robinson, 131 Conn. App. 760, 780-81 (2011); Young v. Rutkin, 79 Conn. App. 355, 363-64 (2003); Sullivan v. Yale-New Haven Hosp., Inc., 64 Conn. App. 750, 766 (2001).[30]

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[29] The suits encompassed in the global settlement were the CNB litigation, Connecticut National Bank v. Julius Rytman et al, No. X01 CV 87 0159941, as well as: Dora Rytman v. Colchester Foods, CV X 01 88 0159961; Julius Rytman v. Colchester Foods, CV X 01 90 0159898-S; Julius Rytman v. Milton Jacobson, CV X01 90 0159900-S; Town of Franklin v. Dora Rytman et al, CV X01 90-0160302-S; Town of Franklin v. Dora Rytman et al, CV X01 90-0160305-S; and Town of Franklin v. Dora Rytman et al, CV X01 90-0160306-S.

[30] A recent decision by this Court, D'Ascanio v. Toyota Indus. Corp., 309 Conn. 663 (2013), also addressed this issue. There, the court found that the preclusion of the plaintiffs' expert was an unwarranted sanction. However, the court distinguished certain of the other cases cited above, finding that dismissal could be warranted where a party presents a witness who is ultimately deemed

C. THIS COURT ALSO SHOULD AFFIRM ON THE ALTERNATE GROUND THAT NORTH RIVER NEVER HAD A DUTY TO DEFEND

1. STANDARD OF REVIEW

A ruling on the duty to defend in the context of a motion for partial summary judgment is a matter of law in which the standard of review is plenary. Hartford Cas. Ins. Co. v. Litchfield Mutual Fire Ins. Co., 274 Conn. 457, 462-463 (2005).

2. NORTH RIVER HAD NO DUTY TO DEFEND

Because the trial court erred in finding that excess insurer North River had a duty to defend, the case should never have gotten this far.[31] The predicate for the Faulkner testimony was the trial court's original finding that North River had breached a duty to defend. But North River never had such a duty. The trial court's finding to the contrary was incorrect.

In a ruling on cross motions for partial summary judgment dated April 6, 2005 (A 589-609) and amplified by a later articulation (A 642-647), the trial court (Quinn, J.) held that North River had a duty to defend during those periods of time when The Hartford did not participate with The Home in providing a defense.

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unqualified by the court. *Id.* at *8.

[31] Alternatively, this issue could be regarded as an adverse ruling which should be considered on appeal within the meaning of Rule 84-11(a). Given its ruling on the main appeal, the Appellate Court declined to consider this issue (which was then characterized alternatively as a contingent cross-appeal), See 139 Conn. App. at 832, n. 3. It is presented here as a matter of right under Rule 84-11 because North River was not aggrieved by the judgment of the Appellate Court [See PB § 84-4(b) and Russell v. Mystic Seaport Museum, Inc., 252 Conn. 596, 600, n.3 (2000) and because this Court does not recognize contingent cross-appeals, See Harris v. Bradley Mem'l Hosp. & Health Ctr., Inc., 306 Conn. 304,321 (2012).

A motion for reargument was denied (A 610-612). Absent permission to appeal interlocutorily, which was requested but denied (A 613-615), this decision was not ripe until now.

The trial court specifically ruled that North River had a defense obligation for a period of approximately eight months from January 14, 2002, when The Hartford withdrew from the defense, until September 10, 2002, the date of the global settlement. The North River policy provides:

> With respect to any occurrence covered by the terms and conditions of this policy, but not covered, as warranted, by the underlying policies listed in Schedule A hereof or not covered by any other underlying insurance collectible by the insured, the company shall: (a) defend any suit against the insured alleging such injury or destruction and seeking damages on account thereof ... (A 606).

Citing this language, the plaintiffs argued, and the trial court agreed (see A 589-612; 642-647), that North River had a duty to "drop down" and provide a defense when the scheduled primary policy,The Hartford, withdrew from defending the underlying suit along with The Home.[32]

However, the trial court's ruling that North River had a duty to defend despite the fact that The Hartford had a duty to defend, and that the other primary insurer,The Home, provided a complete defense, misreads the policy language, eviscerates fundamental principles of excess coverage, ignores the rule that a defending insurer must defend the entire case, and overlooks the fact that the plaintiffs suffered no harm.

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[32] Due to their policy periods, The Home's duty to defend arose from the Schwartz Farm incident, whereas The Hartford's duty arose from the CNB incident.

As a threshold matter, North River can have no duty to defend unless the underlying CNB suit was for an occurrence covered by the terms and conditions of the North River policy. The trial court focused on the allegations of Count Twelve of the underlying complaint, finding that it alleged claims potentially within the coverage of The Hartford's policy (A 601-604) and the North River policy (A 607) (relying on analysis with respect to The Hartford's duty to defend). Despite the fact that gravamen of the complaint plainly was the parties' business dealings and alleged economic harm, the trial court stated that there nonetheless was a potential for coverage based on one count that alleged -- as a by-product of the financial issues -- emotional distress resulting in physical ailments (A 603). The trial court also stated that it could be "inferred" that the remarks by Mr. Kofkoff in the CNB meeting were "negative and disparaging" remarks such that coverage might exist for "injury arising out of publication or utterance of a libel or slander or other defamatory or disparaging material." (A 604-605).

The trial court's analysis, however, stretched too far. As another court explained in Waller v. Truck Ins. Exch., 32 Cal. Rptr. 2d 692, 701 (Cal. Ct. App. 1994), aff'd, 11 Cal 4th 1 (1995), "[w]e cannot torture the duty to defend by allowing pleadings of emotional and physical distress resulting from financial injury to convert uncovered claims for economic losses into potentially covered claims for bodily injury." The California Supreme Court, in affirming that ruling, took time to explain further that "the finding of no duty to defend in this context is consistent with the reasonable expectations of the parties when they enter into a contract for commercial general liability insurance, for it is widely understood by

both insureds and insurers that such policies are not intended to cover economic losses." 11 Cal. 4th at 15. As in Waller, the damages alleged in the Rytmans' underlying complaint here flowed from intangible property losses that could not be considered covered occurrences under the North River policy. Id. The derivative emotional distress damages sought for the alleged business torts are not covered because they flowed from the same noncovered acts. Id. "Any damages flowing from noncovered losses that may lead to emotional distress cannot be used to expand coverage where none was intended or bargained for by the parties." Id. at 16. And, just as the incidental emotional distress could not turn a suit brought due to uncovered economic losses into a covered claim, so too with incidental allegations from which the trial court here "inferred" a potentially covered personal injury claim (A 604)[33]

The better view is that the CNB suit does not concern an occurrence within the terms of the North River policy and thus there can be no duty to defend. Even assuming arguendo that the CNB suit did allege a covered occurrence, however, there could be no duty to defend on the part of North River. As an excess insurer, North River's policy provided a duty to defend a covered occurrence only when it was "not covered, as warranted, by the underlying policies listed in Schedule A hereof or not covered by any other underlying insurance collectible by the insured." (A 840).

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[33] Despite plaintiffs'' efforts to classify the CNB complaint as one based on libel, slander or defamation of character, it is evident that the true gravamen of the complaint is the financial losses suffered by the Rytman's and their egg farming business. (A 972-1011).

First, the trial court held that The Hartford, which issued underlying, collectible insurance, had a duty to defend for the same time period as North River. The Hartford's policy was not exhausted at any point during the relevant period.[34] The defense that was owed during that time period was owed by The Hartford, the primary insurer. North River should not be obligated to make up for *another insurer's* breach of duty.

Moreover, North River's policy language provides that it must defend when an occurrence is not "covered" by *any* underlying primary policy.[35] The question of whether an occurrence is "covered" requires a separate analysis of defense and indemnity—in this case, the only relevant issue is defense. The Home provided a defense for the entire case. Further, when The Hartford withdrew from the defense, The Home assumed that share of defense expenses which The Hartford had previously paid (A 496-511).[36] As required by basic

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[34] The Hartford made no indemnity payment until the recent settlement in 2009 (A 128-133).

[35] This language makes the North River policy "true" excess coverage. This is to be distinguished from "incidental" excess coverage which converts an excess policy into a primary policy by virtue of an other insurance clause. See Couch on Insurance 3d, §200:39; Holmes, Appleman on Insurance 2d, Interim Vol. 23, §145.4[C]. The rule that an excess insurer does not have a duty to defend when a primary insurer is defending is applicable *a fortiori* in the case of "true" excess coverage. See also Utah Power & Light Co. v. Federal Ins. Co., 983 F.2d 1549 (10th Cir. 1993) (holding excess insurer does not have duty to defend where primary policy is not exhausted under exact same policy language).

[36] It is axiomatic that, if there is a duty to defend arising under any of the allegations of the complaint, there is a duty to defend the entire case. See Capstone Building Corp. v. American Motorists Ins. Co., 308 Conn. 760 , 805 (2013); Clinton v. Aetna Life & Surety Co., 41 Conn. Supp. 560, 565-566 (1991); Windt, Insurance Claims and Disputes, § 4-10.

principles of insurance law, which hold that the duty to defend is broader than the duty to indemnify, The Home defended the entire CNB suit, not just those allegations that might have given rise to its indemnity obligation. Thus, under the plain language of the policy, the defense of the CNB suit was indeed "covered." Like The Hartford's, The Home's policy was not exhausted during this period.[37]

It is a fundamental principle of insurance coverage law that an excess insurer has no duty to defend when there is a primary insurer whose policy has not been exhausted and who is providing a complete defense to the same case. Both the overwhelming majority of cases in other jurisdictions,[38] and virtually

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[37] The pleadings, the transcripts of the oral argument, and the depositions make clear that The Home did not pay its full policy in 2002 and that, as of that time, there was no exhaustion of the coverage of either of the two primary insurers (See A 540; 727; 915).

[38] See Keck, Mahin & Cate v. National Union Fire Insurance Co. of Pittsburgh PA, 20 S.W.3d 692 (Tex. 2000); Continental Casualty Co. v. Synalloy Corp., 667 F. Supp. 1563 (S.D. Ga 1983); Community Redevelopment Agency v. Aetna Cas. & Sur. Co., 50 Cal. App. 4th 329, 57 Cal. Rptr. 2d 755 (1996); Hartford & Indem. Co. v. Cont'l Nat'l American Ins. Co., 861 F.2d 1184, 1185 (9th Cir. 1988); Utah Power & Light Co. v. Federal Ins. Co., 983 F.2d 1549 (10th Cir. 1993); Molina v. United States Fire Ins. Co., 574 F.2d 1176, 1178 (4th Cir. 1978); Federated Mut. Ins. Co. v. Pennsylvania Nat'l Mut. Ins. Co., 480 F. Supp. 599, 600 (E.D. Tenn. 1979) aff'd 659 F.2d 1080 (6th Cir. 1981); Canal Ins. Co. v. Occidental Fire and Cas. Co. of North America, 462 F. Supp. 512, 513 (W.D. Okla. 1978); Signal Companies, Inc. v. Harbor Ins. Co., 27 Cal. 3d 359, 165 Cal. Rptr. 799, 804, 612 P.2d 889, 894 (1980); Nabisco Inc. v. Transport Indemnity Co., 143 Cal. App. 3d 831, 192 Cal. Rptr. 207, 209 (1983); Colorado Farm Bureau Mutual Ins. Co., North American Reinsurance Corp., 802 P.2d 1196, 1198 (Colo. Ct. App. 1990); Occidental Fire & Cas. Co v. Underwriters at Lloyds, London, 19 Ill. App. 3d 265, 311 N.E. 2d 330, 334 (1974); Fireman's Fund Ins. Co. v. Rairigh, 59 Md. App. 305, 475 A.2d 509, 517 (1984); Nordby v. Atlantic Mutual Ins. Co., 329 N.W.2d 820 (Minn. 1983); U.S. Fire Ins. Co. v. Aspen Building Corp., 367 S.E.2d 478 (Va. 1988); U.S. Fire Ins. Co. v. Roberts and Schaefer Co., 37 Wash. App. 683, 683 P.2d 600 (1984).

every major insurance treatise or other secondary source,[39] articulate this principle. Connecticut courts also have recognized that an excess insurer does not have an obligation to drop down and provide indemnity coverage in the case of a primary insurer's insolvency.[40] The plaintiffs' controller, Blair Hagy, who was responsible for negotiating the plaintiffs' insurance contracts, acknowledged at his deposition that excess coverage is invoked only when primary coverage is exhausted (See A 904-906). This principle is also implicit in the trial court's own original holding that North River had no duty to defend when The Hartford was defending.[41] Thus, because The Home was providing a complete defense,

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[39] E.g., Holmes, Appleman on Insurance 2d, Interim Vol. 23, §145.2[A]; Russ & Segalla, Couch on Insurance 3d, §§ 200:38, 200:41; Windt, Insurance Claims and Disputes (4th ed.), § 4-11; Ostrager & Newman, Handbook on Insurance Coverage Disputes, 15th ed., Vol. 1, § 6.03[b]; 90 ALR 3d 1199 annotation entitled Performance by one insurer of its duty to defend as excusing failure of other insurers equally obligated to defend; Rights and Responsibilities of Excess Insurers, 78 Denver U.L. Rev. 29 (2000).

[40] See Dexter Corp. v. National Union Fire Insurance Co. of Pittsburgh, Pa., No. 95-702, 1997 WL 289677 (D. Conn. Mar. 12, 1997) aff'd 131 F. 3d 130 (2d Cir. 1997); Veterans Memorial Center v. Connecticut Insurance Guaranty Ass'n., 1996 WL 634264, 18 Connecticut Law Reporter 39 (Conn. Super. 1996); England v. Reliance Ins. Co., No. 20079606, 2004 WL 425139 (Conn. Super. Feb. 24, 2004); but see Republic Ins. Co. v. North American Philips Corp., No. 376040, 1991 WL 148923 (Conn. Super. July 24, 1991).

[41] The principle that an excess insurer has no duty to defend when a primary is defending is also implicitly recognized by the plaintiffs' own actions in the case of Colchester Egg Farm Ltd. et al v. Home Insurance Company et al., CV 94-0532267-S, an action brought in 1994 to obtain reimbursement for defense expenses from 1988 through 1991 (See A 1050-1065). On information and belief, the plaintiffs eventually withdrew the action against North River after The Home and The Hartford (but not North River) agreed to reimburse the plaintiffs for defense expenses.

pursuant to its own duty to defend, and its policy had not been exhausted, North River had no duty to drop down and provide a defense.[42]

Many courts and commentators have recognized specifically that, when there is excess coverage over multiple primary policies, an excess insurer must defend only when *all* primary policies are exhausted.[43] There is no exception to the fundamental rule that an excess insurer has no defense obligation when a primary insurer is defending when two consecutive primary insurers are held to owe coverage.[44] As long as at least one primary insurer continues to provide a defense, an excess insurer has no duty to drop down. This principle of horizontal exhaustion reaffirms that North River had no duty to defend while The Home's policy remained unexhausted. Thus, North River had no duty to drop down and

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[42] The plaintiffs' argument in the Appellate Court that an excess insurer's duty to defend may be activated when a claim exceeds the primary policy limits even when a primary insurer is defending is very much a minority rule. See 7-6, 10-4, Windt, Insurance Claims and Disputes, 4th ed. (2007); 19 ALR 4th 107, Allocation of Defense Costs Between Primary and Excess Insurance Carriers; Continental Cas. Co. v. Synalloy, 667 F. Supp. 1523 (S.D. Ga. 1983). In any event, this rule is applicable to inter-insurer conflict and cannot be used to benefit an insured whose defense costs have been completely paid.

[43] See Community Redevelopment Agency v. Aetna, 50 Cal. App. 4th 329 (Cal. 1996); Kajima v. St. Paul Fire & Marine Ins. Co., 879 N.E. 2d 305 (Ill. 2007); Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 802 A.2d 1070 (Md. App. 2002); Dow Corning Corp. v. Continental Cas. Co., No. 200143, 1999 WL 33435067 (Mich. App. Oct. 12, 1999); Padilla Construction Co., Inc. v. Transportation Ins. Co., 150 Cal. App. 4th 984, 58 Cal. Rptr. 3d 807 (2007); Maremount Corp. v. Continental Casualty Co., 760 N.E.2d 550 (Ill. App. 2001); see also Holmes, Appleman on Insurance 2d, Interim Vol. 23, §145.4[A][1]; Thomas M. Jones, An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases, 10 Vill. Envtl L.J. 25 (1999).

[44] The only known contrary authority to this overwhelming body of law is Northwest Pipe Co. v. RLI Ins. Co., 734 F. Supp. 2d 1122 (D. Or. 2010). The trial court ruling under Oregon law in Northwest Pipe is clearly an outlier.

provide a defense until *both* The Hartford and The Home policies were exhausted.

Finally, because The Home provided a full defense, The Hartford's withdrawal had no harmful effect on the defense provided to the plaintiffs. Mr. Kofkoff acknowledged that he did not pay "one cent more" in defense costs after the Hartford withdrew (A 885). There was no diminution in the quality of their representation.[45] The defense the plaintiffs continued to receive from January to September 2002 was exactly the same defense they would have received if The Hartford had not withdrawn. North River never had an obligation to provide a defense to the plaintiffs because they were receiving a full defense as a result of their primary coverage with The Home.[46]

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[45] Joseph Fortin acknowledged that a full defense was provided through the global settlement (A 864). The claims representative for The Home, Ron Barta, also testified that there were no damages from any lack of defense after The Hartford withdrew (A 914) and that The Home provided a full and complete defense until the case was settled (A 919). Dina Fisher, the attorney who handled the matter at Robinson & Cole, testified that the quality of the defense remained the same after The Hartford's withdrawal (A 899). Both Robert Kofkoff and Joseph Fortin testified that they were satisfied with the representation provided by Robinson & Cole (A 889-893; 856; 858).

[46] The only effect of The Hartford's withdrawal was to increase the defense expenditures of the Home. In Home Insurance Company in Rehabilitation v. Hartford Underwriters Insurance, The Home sued to recover these sums (See A 1012-1049). As part of a mediation of this case before Judge Hodgson, The Hartford settled with The Home, and The Home thereafter provided a release to North River without requiring any contribution. Citing cases as Peloso v. Imperatore, 434 A.2d 274, 279 (R.I. 1981), the plaintiffs argued in the Appellate Court that a primary insurer may have a duty to defend even when another primary insurer is defending. That rule may have aided The Home in recouping its increased defense expenses from The Hartford, but it has no applicability here, where North River is an excess insurer whose obligations do not attach until the primary coverage is exhausted.

The plaintiffs argued in the Appellate Court that they were harmed because they were compelled to retain separate counsel because they were exposed to a large judgment. This claim of harm, however, relates to indemnity rather than defense. The right of an insured to a competent defense is not "harmed" when an insurer reserves the right to contest its obligation to indemnify. An insurer who defends under a reservation of rights is not estopped from asserting indemnity defenses, City of West Haven v. Hartford Ins. Co., 221 Conn. 149, 165, 602 A.2d 988 (1992). North River's reservations of its rights did not create the harm that plaintiffs allege (See A 680, 683).

For all of these reasons, the trial court's ruling that North River had a duty to defend was incorrect. This Court can affirm judgment for North River on this alternate ground.

D. THIS COURT SHOULD REJECT PLAINTIFFS' ARGUMENTS FOR THE ADDITIONAL REASON THAT THE MISSIONARIES RULE SHOULD NOT BE EXTENDED TO THIS CASE

1. STANDARD OF REVIEW

Interpretation of the Missionaries rule is a legal issue as to which the standard of review is plenary.

2. THE MISSIONARIES RULE SHOULD NOT BE APPLIED HERE

As noted above, the plaintiffs suffered no harm from The Hartford's withdrawal from the defense and North River's alleged breach of the duty to defend. Their pursuit of this meaningless "duty to defend" claim despite the obvious lack of harm instead reveals a litigation agenda to leverage North River's alleged breach of a duty to defend into a disproportionate claim for indemnity of

their global settlement, applying an unreasonably broad reading of the Missionaries rule (See A 785-790; 1066-1073; 960; 530). *The plaintiffs here received a complete defense to the litigation* (A 496-511; 889-893; 856; 864; 858; 899; 914; 919), and no harm flowed from North River's alleged breach of the duty to defend. The "automatic indemnity" of the Missionaries rule should not be extended to the facts of this case, and this provides an additional ground for affirmance.[47]

The rule that the consequences of an unjustified failure to defend should result in the loss of the right to contest indemnity is sometimes colloquially referred to as "automatic indemnity."[48] The automatic indemnity feature of the Missionaries rule (as refined in Capstone) is a minority position throughout the United States. It has been rejected expressly in twenty-one jurisdictions, including Alabama,[49] Alaska,[50] Arizona,[51] California,[52] Colorado,[53] Florida,[54]

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[47] See footnote 31. This issue was briefed in the Appellate Court but not considered by that court.

[48] Rather than require a policyholder to demonstrate the scope of damages incurred as a result of the breach of a duty to defend, the "automatic indemnity" approach uses the judgment in the litigation as a proxy for the harm suffered by a policyholder for whom a defense was not afforded in the litigation.

[49] Alabama Farm Bureau Mutual Casualty Insurance Co. v. Moore, 349 So. 2d 1113, 1116 (Ala.1977); Ala. Hosp. Ass'n Tr. v. Mut. Assur. Soc., 538 So.2d 1209, 1216 (Ala. 1989).

[50] Afcan v. Mutual Fire, Marine & Inland Ins. Co., 595 P.2d 638, 646-647 (Alaska 1979); but see Sauer v. Home Indem. Co., 841 P.2d 176, 182-184 (Alaska 1992).

[51] Farmers Insurance Company v. Vagnozzi, 675 P.2d 703, 708 (Ariz.1983).

[52] Hogan v. Midland National Insurance Company, 476 P.2d 825, 832-833

Georgia,[55] Hawaii,[56] Idaho,[57] Kansas,[58] Kentucky,[59] Maine,[60] Maryland,[61] Massachusetts,[62] Michigan,[63] North Dakota,[64] New Jersey,[65] Oregon,[66]

(Cal.1970).

[53] Flannery v. Allstate Ins. Co., 49 F. Supp. 2d. 1223, 1227-1229 (D. Colo. 1999).

[54] Caldwell v. Allstate Ins. Co., 453 So.2d 1187, 1191 (Fla. Dist. Ct. App. 1984); Spencer v. Assurance Co. of America, 39 F.3d 1146, 1149 (11th Cir. 1994) (applying Florida law); Baron Oil Co. v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810, 816 (Fla. Dist. Ct. App. 1985).

[55] Colonial Oil Indus. v. Underwriters, 491 S.E.2d 337 (Ga. 1997); McCraney v. Fire & Cas. Ins. Co. of Connecticut, 357 S.E.2d 327 (Ga. App. 1987).

[56] Sentinel Insurance Co. v. First Ins. Co. of Hawaii, 875 P.2d 894, 907-914 (Haw. 1994).

[57] Hirst v. St. Paul Fire & Marine Ins. Co., 683 P.2d 440, 446-447 (Idaho 1984).

[58] Murphy v. Silver Creek Oil & Gas Inc., 837 P.2d 1319, 1321-1322 (Kan. App.1992); Johnson v. Studyvin, 828 F. Supp. 877, 886-887 (D. Kan. 1995) and 839 F. Supp. 1490, 1497 (D. Kan. 1993).

[59] Cincinnati Insurance Co. v. Vance, 730 S.W.2d 521 (Ky. 1987).

[60] Elliott v. Hanover Ins. Co., 711 A.2d 1310, 1313-1314 (Me. 1998).

[61] Fireman's Fund Ins. Co. v. Rairigh, 475 A.2d 509 (Md. App. 1984); Orweiss v. Erie Insurance Exchange, 509 A.2d 711, 715-716 (Md. App.1986).

[62] Polaroid Corp. v. Travelers Indemnity Co., 610 N.E.2d 912, 919-923 (Mass. 1993).

[63] St. Paul Ins. Co. v. Bischoff, 389 N.W.2d 443, 444 (Mich. App.1986) (expressly rejects rule "used by courts in Illinois and Connecticut").

[64] Sellie v. North Dakota Ins. Guar. Assn., 494 N.W.2d 151, 155-156 (N.D. 1992) (applying Minnesota law).

[65] Burd v. Sussex Mutual Ins. Co., 267 A.2d 7, 13-14 (N.J. 1970).

[66] Timberline Equipment Co., v. St. Paul Fire & Marine Ins. Co., 576 P.2d

Pennsylvania,[67] Texas[68] and Washington.[69] And, it has been at least implicitly rejected in many others, which articulate different rules governing the consequences of an insurer's failure to defend.[70] It is not endorsed by the major insurance treatises or recent law journal articles.[71] As this Court recently noted

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1244, 1248 (Or. 1978); Northwest Pump & Equip. Co. v. American States Ins. Co., 925 P.2d 1241 (Or. App. 1996).

[67] American States Ins. Co. v. State Auto Ins. Co., 721 A.2d 56 (Pa. Super. Ct. 1998).

[68] Enserch Corp. v. Shand Morahan & Co., 952 F.2d 1485, 1493 (5th Cir. 1992)(applying Texas law).

[69] Underwriters at Lloyds v. Denali Seafoods, Inc., 927 F.2d 459, 462-464 (9th Cir. 1991) (applying Washington law); Time Oil Co. v. CIGNA Prop. & Cas. Ins. Co., 743 F. Supp. 1400, 1421 (W.D. Wash. 1990) (applying Washington law).

[70] Foreman v. Jongkind Bros., Inc., 625 N.E.2d 463, 469 (Ind. Ct. App. 1993); Fontenot v. State Farm Mutual Ins. Co., 119 So.2d 588, 595 (La. Ct. App. 1960); Lowe & Sons, Inc. v. Great American Surplus Lines Ins. Co., 572 So.2d 206, 209 (La. Ct. App. 1990); Southern Farm Bureau Cas. Ins. Co. v. Logan, 119 So.2d 268, 272 (Miss. 1990); Whitehead v. Lakeside Hospital Ass'n, 844 S.W.2d 475, 481 (Mo. App. W.D. 1992); Southwestern Bell Tel. Co. v. Western Casualty & Sur. Co., 269 F. Supp 315 (E.D. Mo. 1967) modified 396 F.2d. 351 (8th Cir. 1968); Farmers Elevator Mutual Ins Co. v. American Mutual Liab. Ins. Co., 173 N.W.2d 378, 387 (Neb.1969); Union Ins. Co. v. Land & Sky, Inc., 568 N.W.2d 908 (Neb. 1977); White Mountain Construction Co., Inc. v. Transamerica Ins. Co., 631 A.2d 907 (N.H.1993); ABC Builders, Inc. v. American Mut. Ins. Co., 661 A.2d 1187, 1191 (N.H. 1995); Prince v. Universal Underwriters Ins. Co., 143 N.W.2d 708 (N.D.1966); Travelers Ins. Co. v. Motorists Mutual Ins. Co., 178 N.E.2d 613 (Ohio 1961); MIC Prop. & Cas. Ins. Co. v. International Ins. Co., 990 F.2d 573 (10th Cir. 1993); Fuller v. Eastern Fire & Cas. Co., 124 S.E.2d 602 (S.C. 1962); McCarty v. Parks, 564 P.2d 1122 (Utah 1977); Orleans Village v. Union Mutual Fire Ins. Co., 335 A.2d 315 (Vt. 1975); London Guarantee & Accident Co., Ltd. v. C.B. White & Bros., Inc., 49 S.E.2d 254 (Va. 1948); Aetna Cas. & Sur. Co. v. Pitrolo, 342 S.E.2d 156, 159 (W.V. 1986).

[71] *See* 14 Couch on Insurance 3d, § 202:12; Alan D. Windt, Insurance Claims and Disputes, 4th ed., § 4.37; Susan Randall, Redefining the Duty to Defend, 3 Conn. Ins. L.J. 221, 230 n. 24 (1997); Todd J. Weiss, A Natural Law Approach to Remedies for the Liability Insurer's Breach of the Duty to Defend: Is

in Capstone, 308 Conn. 760, 805 fn 45, (2013), the Missionaries rule "is not universally accepted." Indeed, automatic indemnity is expressly endorsed[72] in only a small number of states: Illinois,[73] Montana,[74] North Carolina,[75] and, possibly, Rhode Island[76] and New York.[77] The majority rule with respect to the

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Estoppel of Coverage Defenses Just?, 57 Albany L. Rev. 145, 154 (1993). See also Sentinel Insurance v. First Ins. of Hawaii, 875 P.2d 894, 911 (1994); Fireman's Fund Ins. Co. v. Rairigh, 475 A.2d 509, cert. denied 482 A.2d 502, 515 (1984) (citing the Appleman insurance treatise for the proposition that automatic indemnity should not be the law). Moreover, automatic indemnity was first articulated before the prevalence of complex insurance coverage situations, which involve unclear coverage triggers, multiple insurers over many years of coverage, long latency periods between the event which produces the liability and the injury which results, and (as here) huge disparities between insurers' defense and indemnity obligations. See Bernier and Scully, Missionaries Should Not Be The Gospel, Connecticut Law Tribune, May 19, 2008 (A 1078) (explaining the problems of Missionaries when applied to modern litigation).

[72] There is conflicting authority in Wisconsin and New Mexico. Compare Hamlin Inc. v. Hartford Acc. & Indem. Co., 86 F.3d 93, 95 (7th Cir. 1996) to Radke v. Fireman's Fund Ins. Co. 577 N.W.2d 366, 370 (Wis. App. 1998); U.S. Fire Ins. Co. v. Good Humor Corp., 496 N.W.2d 730 (Wis. 1993); and Liebovich v. Minnesota Ins. Co., 728 N.W.2d 357, 361 (Wis. Ct. App. 2007) and Servants of Paraclete Inc. v. Great American Ins. Co., 857 F. Supp. 822 as modified by 866 F. Supp. 1560 (D.N.M. 1994) to State Farm Fire & Cas. Co. v. Ruiz, 36 F. Supp. 2d 1308, 1316-1318 (D.N.M. 1999).

[73] Sims v. Illinois National Casualty Co., 193 N.E.2d 123 (Ill. Ct. App. 1963); Thornton v. Paul, 384 N.E.2d 335, 340 (Ill. 1979).

[74] Farmers Union Mut. Ins. Co. v. Staples, 90 P.3d 381, 385 (Mont. 2004); Grindheim v. Safeco Ins. Co. of America, 908 F. Supp. 794, 798 (D. Mont. 1995).

[75] Ames v. Continental Casualty Co., 340 S.E.2d 479 (N.C. 1986); St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co., 919 F.2d 235 (4th Cir 1990 [applying N.C. law]).

[76] Conanicut Marine Serv., Inc. v. Ins. Co. of N. America, 511 A.2d 967 (R.I. 1986). But see Emhart Industries Inc. v. Home Ins. Co., 515 F. Supp. 2d 228 (D. R. I. 2007) which referred to Conanciut Marine as an outmoded minority view.

[77] In K2 Investment Group, LLC et al v. American Guarantee & Liability

consequences of an insurer's wrongful breach of the duty to defend is that the policyholder is entitled to normal contract damages, i.e., there must be a showing that the policyholder was made worse off by the breach of the duty to defend than he would have been had the breach not occurred. See e.g., Hamlin Inc. v. Hartford Acc. & Indem. Co., 86 F.3d 93, 95 (7th Cir. 1996) (citing the third edition of Windt).

The Missionaries rule should not be extended to cases where there is a complete and unique absence of harm. The purpose of the Missionaries rule is to fully recompense the non-breaching party for its losses sustained because of the breach, and that purpose is not served by extending the rule to the case at hand. Here, The Home provided a complete defense to the plaintiffs for the entire course of the litigation. Under the automatic indemnity rule, liability for the judgment or settlement is treated as a proxy for harm suffered by the policyholder as a result of being without a defense. Here, since there was no lack of defense, it makes no sense to award automatic indemnity with respect to the plaintiffs" settlement.

In Sacharko v. Center Equities Limited Partnership, 2 Conn. App. 439, 447, 479 A.2d 1219 (1984), the Appellate Court declined to extend the Missionaries rule when the insured was not the real party in interest because the

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Insurance Company, ___ N.E.23d ___; 2013 WL 2475869 (N.Y. June 11, 2013), the New York Court of Appeals held that an insurer who has breached its duty to defend may not later rely on policy exclusions to escape its duty to indemnify is insured for a judgment against him. Yet New York has long been regarded as a jurisdiction which had rejected automatic indemnity in Servidone Const. Corp. v. Security Ins. Co., 477 N.E.2d 441 (N.Y.1985). A motion for reargument is pending in K2 Investment Group LLC.

defense had been paid for by another insurer. The Court held that "[t]o do so would convert a rule of compensation for loss into an opportunity for windfall". See also Nordby v. Atlantic Mut. Ins. Co., 329 N.W.2d 820, 824 (Minn. 1983) (insured held not to be real party in interest because he incurred no costs in defending the earlier action and was not damaged by the alleged failure to defend). Here, as in Sacharko and Nordby, the plaintiffs have suffered no harm, even if there were a breach of the duty to defend. Although Connecticut law has adopted the Missionaries penalty in cases where a breach of the duty to defend harms the policyholder, it should not extend it to circumstances such as those presented here, where the policyholder's interests were fully protected and it in fact received a full defense.

It is widely recognized that, in an action for breach of contract, the plaintiff should not be put in a better position than if the defendant had actually performed. See, e.g., Argentinis v. Gould, 219 Conn. 151, 157-58 (1991); Vines v. Orchard Hills, Inc., 181 Conn. 501, 506-07 (1980). In other words, a breaching party is liable for "such damages as might have been reasonably contemplated, at the date of the contract, as the probable and direct result of its breach." Lewis v. Hartford Dredging Co., 68 Conn. 221, 234 (1896). Imposing "automatic indemnity" as a penalty for breach of the duty to defend in this situation contravenes this bedrock principle and obviously would award the plaintiffs a windfall. There is no basis under these circumstances for the Court to "provide for a 'rewriting' of the policy contract to award insured more than their purchased coverage." Time Oil Co. v. CIGNA Prop. & Cas. Ins. Co., 743 F. Supp. 1400,

1421 (W.D. Wash. 1990) (quotation omitted); Windt, § 4.34 (collecting cases); accord 22 Eric Mills Holmes, Holmes' Appleman on Insurance § 136.8(B)(1) (2003) (collecting cases).

The Missionaries rule is based on the principle that the insurer must indemnify the insured because, based on the claims asserted, there was a possibility of coverage, and the insured's settlement constituted damages the insured necessarily suffered by reason of the insurer's failure to defend it. Here, the plaintiffs were fully defended in the underlying suit, and their global settlement was voluntarily negotiated to end their long-running feud—far from being necessitated by an alleged failure to defend on the part of North River. Thus, there are important policy considerations that weigh against applying the Missionaries rule to this case. To extend Missionaries here would impose punitive liability without regard for the actual contract damages incurred by a policyholder. This Court should not sanction that result.

Finally, the plaintiffs' effort to apply the Missionaries rule here violates the Due Process Clause of the United States Constitution. There is gross disproportionality in the "automatic" award of indemnity coverage as a penalty for a purported breach of the duty to defend, particularly where no injury to the plaintiffs' resulted. See Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). Such arbitrary damages, untethered to any underlying contractual liability, would raise significant due process concerns. See State Farm Mut. Auto. Ins. Co. v.

Campbell, 538 U.S. 408 (2003) ($145 million punitive damage award struck down, where plaintiff was entitled to only $1 million in compensatory damages).

For the above reasons, Missionaries should not be applied here because the plaintiffs received a complete defense. To hold otherwise would permit a windfall.

III. CONCLUSION

For all the above reasons, the decision of the Appellate Court should be affirmed.

RESPECTFULLY SUBMITTED

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CERTIFICATIONS

CERTIFICATION AS TO FORMAT

I hereby certify that this brief complies with all the provisions of Rule 67-2 of the Rules of Appellate Procedure as to format. In light of the fact that this is a Supreme Court case, I also certify that an electronic version of this brief has been submitted pursuant to the Court's guidelines on electronic submission in addition to the paper copy that has been filed with the Court.

Frank H. Santoro

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing brief of the Defendant-Appellee North River Insurance Company with separate two volume appendix has been mailed by first class mail postage prepaid via Brescia's Printing Services this 29th day of August, 2013 to the following counsel and Trial Judges:

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